CORPORATE PERSONALITY.

[*Continued.*]

IN the former portion of this article, some of the leading foreign theories as to the nature of corporate personality, which in recent years have been promulgated by French, German, and Italian jurists with indefatigable industry and notable learning and brilliance, were briefly outlined; a short statement was made of the traditional doctrine of Anglo-American law upon the subject, and some of the inconsistencies of that doctrine were mentioned; and afterwards an examination of the subject on principle was begun. The result of this examination was the conclusion that a corporation, or indeed any group or succession of men — such as the Church, or an army, or a political party — is a real entity — something other than the mere sum of the members for the time being; but that this entity is actually impersonal, and is regarded as a person only by way of metaphor or by a fiction of law. We now proceed to test this theory that a corporation is a real but impersonal entity, which is personified by a legal fiction or metaphor, by applying it to various situations and questions which arise in corporation law. We shall then consider the use, if any, of the fiction of corporate personality, and certain classes of errors in its application. Lastly, the article will conclude with a practical suggestion as to the best method of treating and studying the doctrine of corporate personality.

V.

Most of the objections which have been so strongly urged in France and Germany against the fiction theory of corporate personality will be found upon examination to militate against the theory that the corporate entity is a fiction rather than against the theory that the personality of that entity is fictitious. For instance, one of those objections is that the state, the sovereign, the source of law and fountain of justice, cannot be a fiction;[1] and

[1] Michoud, La Théorie de la Personnalité Morale, secs. 9–12.

that therefore no theory can be tenable which would treat the existence of all corporations, including the state, as fictitious. But the simple reply is that while the personality of the state is a fiction, the existence of the state as an entity is real. The state, like other corporations, is actually an impersonal entity; by a legal fiction or metaphor, that impersonal entity is regarded as a person.[2] Uncle Sam is a fictitious person; but the government of the United States is a reality.

This theory of the nature of corporate existence and personality — the one being real, the other imaginary or metaphorical — will be found to remove many of the historic difficulties which the courts have encountered in corporation law.

For example, if the corporate personality is imaginary, there is no limit to the characteristics and capacities which may be attributed to that personality. Thus, the old difficulty, which so long troubled our courts, that a corporation has no mind and is therefore incapable of entertaining malice, of contriving a fraud, or of doing any other act involving a mental state, vanishes. If you can imagine that a corporate entity is a person, you can also imagine that this person has a mind. Consequently, corporations can be guilty of fraud, of malice, or of crimes involving a particular mental state. To take the opposite view would be like arguing that Hamlet must have been insane, because he was a fictitious person and therefore could have no mind.

Similarly, the famous *dictum* of Sir Edward Coke that corporations cannot be excommunicated because they have no souls, is seen to be illogical. This is illustrated by the history of the canon law, from which Coke derived his statement. Thus, Innocent IV held that corporations, or *universitates*, could not take an oath, or be baptized or excommunicated, because "*universitas non habet corpus nec animam, est res inanimata*";[3] but later it was reasoned, "*licet non habeant veram personam, tamen habent personam fictam fictione juris, et sic eadem fictione animam habent et delinquere possunt et puniri.*"[4]

To this power of the legal imagination the only limit — if limit

[2] Hence it is not true, as stated by M. Michoud, in La Théorie de la Personnalité Morale, sec. 11, that only the conception of the state as a person can save its unity.

[3] Ferrara, Le Persone Giuridiche, 77; Binder, Das Problem der juristischen Persönlichkeit, 4.

[4] Binder, Das Problem der juristischen Persönlichkeit, 6.

it can be called — is set by the futility of extending to an absurdity the conception of corporate personality. For instance, it is often said that a corporation cannot be imprisoned, because it has no body.[5] Now, this statement is not logical. For if we can imagine a corporation to be a person, we can also imagine that this person possesses a body capable of being imprisoned. The law is, therefore, able to impute to a corporation a body and to imagine this body as imprisoned. But *cui bono?* A threat of imaginary punishment would not deter any rational being from wrongdoing; and we have seen above that only rational beings can be subject to the law's commands. To be sure, if the imaginary imprisonment of the corporate person involved the actual imprisonment of some of its members, the latter might be deterred from illegal action on behalf of the corporation by the fear of such punishment. The law refrains from the conception of imprisonment of the corporate person not because the legal imagination cannot go to that length, but because to carry the metaphor so far would provoke a smile, and would serve no good purpose.

It follows, also, that *in rerum naturâ* there is no distinction between a personified entity and an entity not personified. All such distinctions depend on positive law. For instance, one state may personify a body of men which the law of their domicile and of their organization expressly declares shall not be personified.[6] The legal imagination can personify a body of men however loosely bound together; and on the other hand it may refrain from personifying a body of men whose organization is of a character ordinarily and naturally regarded as corporate. There is, therefore, no *régime personnifiant*, as a brilliant French writer has contended.[7] There are some associations which it is more *natural* to personify than others; there are none that it is *impossible* to personify.

For example, the human mind is so constituted that it is difficult not to personify a compact hierarchy like the Roman Catholic Church. We instinctively speak and think of that organization as a person; and the law finds it difficult or impossible to refrain from doing the same.[8] But the power of imagination is not strained

[5] 1 Bl. Comm. 476.

[6] Liverpool Ins. Co. *v.* Massachusetts, 10 Wall. (U. S.) 566.

[7] De Vareilles-Sommières, Les Personnes Morales, sec. 847 *et seq.*

[8] Ponce *v.* Roman Catholic Church, 210 U. S. 296.

to its utmost by regarding such a close organization as a person. On the contrary, the most extreme Protestant, whose conception of the Catholic Church is that of a disorganized, incoherent, scattered body of believers, nevertheless personifies that disconnected number of men, who are bound together by no organic tie; and he uses in reference to them the same personal pronouns, adjectives, and appellations that are applied to the Roman Catholic Church. Even a purely inanimate object may be personified.[9] For instance, in admiralty law a ship is to some extent personified.

Consequently, the distinction between a personified company, or corporation, and an unincorporated company, or company not personified, depending as it does upon positive law rather than upon any natural differences between the two classes of companies, is of the haziest character. When the matter is considered in this light we see the reason for the difficulty, not to say impossibility, which has been encountered in attempting to draw the line between an incorporated or personified body and an unincorporated body. What is the criterion? Is it limited liability? Surely not; for there are corporations the liability of whose members is unlimited, and unincorporated companies whose members enjoy limited liability. Is it continuous succession, or the capacity for transfer or transmission of shares? That cannot be; for membership in some corporations is not transferable, while shares in many unincorporated companies may be freely aliened. We might go on through the whole list of usual distinctions between incorporated and unincorporated associations, and demonstrate that no one of them is controlling. The case becomes still clearer when we note that in French law one of the most strongly emphasized distinctions between a personified company and a com-

[9] "In popular language, and in legal language also, when strictness of speech is not called for, the device of personification is extensively used. We speak of the estate of a deceased person as if it were itself a person. We say that it owes debts, or has debts owing to it, or is insolvent. The law, however, recognizes no legal personality in such a case. The rights and liabilities of a dead man devolve upon his heirs, executors, and administrators, not upon any fictitious person known as his estate. Similarly, we speak of a piece of land as entitled to a servitude, such as a right of way over another piece. So, also, in the case of common interests and actions, we personify as a single person the group of individuals concerned, even though the law recognizes no body corporate. We speak of a firm as a person distinct from the individual partners. We speak of a jury, a bench of judges, a public meeting, the community itself, as being itself a person instead of merely a group or society of persons." Salmond, Jurisprudence, 2 ed., 283.

pany not personified is that in the former case the joint creditors enjoy a preference in respect to the joint assets over the separate creditors of the several members, while in the case of a company not personified the joint creditors and separate creditors rank *pari passu*.[10] Yet we of the common law are quite familiar with the fact that with us, even in the case of a mere partnership, which is not personified, the joint creditors are entitled to a preference. The truth is that there is no characteristic, and no group of characteristics, which can be possessed by no companies except such as *must* be regarded as incorporated or personified. The law can personify any group or succession of men whatsoever, and yet may provide that it shall not possess any one of the usual characteristics of a corporation; and conversely it may declare that an association which possesses none of those characteristics shall nevertheless be personified.

VI.

What then, it may be asked, is the advantage of the exercise of the legal imagination by personifying some groups of men? Cannot the state legislate directly? Why does it need the aid of a fiction? asks M. de Vareilles-Sommières.[11] Then that witty writer takes up one by one the supposed results of the personification of the corporate entity, and demonstrates conclusively that each and all of them, as stated in the last paragraph, may be laid down by the law without the aid of any fiction, and without the intervention of any imaginary personality.[12]

Nevertheless the personification of the corporate entity serves

[10] 2 Lyon-Caen et Renault, Traité de Droit Commercial, 4 ed., 106–108.

[11] De Vareilles-Sommières, Les Personnes Morales, sec. 382: "Pourquoi, encore une fois, la loi recourrait-elle à la fiction? Pour s'autoriser elle-même à prendre des mesures qui sont justes ou utiles? A-t-elle besoin de ce détour? Ne peut-elle aller droit au but? N'est-elle pas la maîtresse absolue de faire les règles qu'elle croit bonnes, sans avoir à justifier d'autre chose que de leur sagesse? Les lois sont les rapports nécessaires qui découlent de la nature des choses; c'est dans les entrailles de la réalité et non dans la domaine de l'imagination qu'elles ont leur raison d'être et leur justification. Quel législateur peut avoir l'étrange idée de se croire obligé de créer un fantôme pour donner satisfaction à des intérêts pratiques, et de rattacher à une chimère des mesures réclamées par le bien public?"

[12] De Vareilles-Sommières, Les Personnes Morales, secs. 383–389.

many a useful purpose. If a code of corporation law could foresee and provide for every possible case to arise in the future, then indeed, as contended by M. de Vareilles-Sommières, it might dispense with personification of the corporate entity, and might legislate directly for every conceivable case. But, unfortunately, it is impossible thus to provide explicitly for every conceivable case. In spite of every precaution, the *casus omissus* will occur; and when it does, then the doctrine of corporate personality comes into play. For the law, recognizing its inability to provide specifically for every case that may arise, after laying down certain rules which make the personification of the corporate entity natural and almost inevitable, — limited liability, continuous succession, unified management, power to sue and be sued, and to take or convey property in the corporate name, — goes on to exact, in effect, that in all other cases, not expressly so provided for, the company shall be treated as if it were a person, or in other words shall be conceived of as a person, or shall be an imaginary or fictitious person.[13]

The conception of corporate personality is a simplification of the processes of thought. Its function is similar to that of an algebraic symbol. A mathematician finds it difficult to carry in his head a complicated expression such as $x^2 + 3ax + b^2$; and in order to simplify his mental processes he says to himself, "Let $y = x^2 + 3ax + b^2$," and then he uses y in his calculations instead of the longer and more cumbrous expression. So it is with the imaginary corporate personality in legal calculations. The lawyer finds himself unable to solve his problems if he thinks of a corporation not as a personified unit but as a shifting body of shareholders, or even as a real but impersonal entity; and he therefore says to himself, in effect, "Let the corporate personality equal the changing body of shareholders in respect to their relations to the joint property." By substituting the more compact idea for the more elaborate, he is enabled to reach correct results with less mental effort.

The mathematician recognizes that his a's and his b's, his x's and y's, have no existence except in his imagination, and that when he attempts to apply his calculations to practical affairs — for example, to determine the stress which a bridge is capable of

[13] *Cf.* Willmott *v.* London Road Car Co. [1910], 2 Ch. 525.

bearing or the distance which a projectile will carry — he must convert his symbols into figures; but he does not overlook the assistance which those symbols have been to him in obtaining his practical results. So a judge, in order to work out a problem in the law of corporations, often finds it convenient to make use of the imaginary corporate person in his calculations; but he must recognize that ultimately the effect of his decree, although it may be expressed in terms of the corporate personality, must be the determination of the rights and liabilities of actual human beings.

Let us take an illustration of this use of the corporate fiction. The regulations of a certain company provide that the directors may exercise all the powers of the corporation except that no bonds shall be issued or mortgage executed without the prior approval of a shareholders' meeting. Nevertheless, without such approval, the directors issue bonds, and execute a mortgage to secure them. Are the bonds valid secured obligations of the company? In order to solve this problem, it is convenient to conceive of the corporation as a personality giving commands to the directors as his or its agents. We say, therefore, that we will regard the bonds as issued by the directors as agents of the imaginary corporate personality in violation of restrictions upon their authority; and as third persons, dealing with the agents, could not justly be expected to see to compliance with such restrictions, therefore, applying the law of agency, we reach the conclusion that the bonds are valid in the hands of innocent third persons. We then drop the symbol of the corporate personality which has been useful to us in reaching our conclusion, and we express the net result in terms of the rights of actual persons by adjudging that the bondholders take the assets and the shareholders get nothing.

VII.

The application of this doctrine of corporate personality seems to be beset with pitfalls as well for the cautious as the unwary.

On the one hand is the temptation to shrink from a logical application of the doctrine, and to refuse to apply it in cases where it ought to be applied. For, if we are to use this conception of a corporation as a person — and we have seen above that we can

escape from reasoning to some extent in terms of that conception — we must carry it out consistently. We cannot capriciously drop the corporate personality from our legal reasoning at any moment when the inclination strikes us. Imagine a mathematician who, at some stage of an intricate problem, should suddenly say to himself, "The square root of minus one is a mere figment of the imagination. I will simply draw a pen through the square root of minus one in this term of this equation; for surely no harm can result from striking out a fictitious and imaginary quantity." Such a mathematician would soon find himself in difficulties, and his final result would be tainted with error. So it is with a lawyer who at some stage of a problem in corporation law determines unceremoniously to drop the conception of a corporation as a person, in order, as he thinks, to eliminate from the calculations a complicating factor. He confuses instead of simplifying his reasoning, and he vitiates the soundness of his conclusions.

The fact that in a particular case the application of the rule that a corporation is to be treated as a person will work hardship is no reason whatever for departing from the theory. For example, if the theory of a corporate entity is to be of any assistance to the courts, actions or suits to redress injuries to the corporation must be brought in the corporate name. Now, if by a blunder of a solicitor, a suit is brought not in the name of the corporation but in the individual names of all the shareholders, hardship may be caused in a particular case by dismissing the bill. Perhaps the statute of limitations would bar a new suit in the name of the corporation. Yet of course that hardship is no reason whatever for permitting the suit by shareholders in their own names to be maintained, in violation of legal theory.

To take another illustration, suppose that one man acquires all the shares of a corporation and then by deed in his own individual name conveys to A a tract of land the title to which is vested in the corporation. The temptation is strong to hold that A gets a good legal title to the land; [14] for why should he suffer loss because the law regards the corporation as a person and does not recognize a deed by the shareholders as equivalent to a deed by the corporation? Nevertheless, to hold that A has a good legal title to the land would be a departure from the theory of a corporation as a

[14] Swift *v.* Smith, 65 Md. 428.

person and, while it might avoid hardship in some particular case, would in the long run work more injustice that it avoids. For instance, if such a deed conveys a good title at law, a subsequent *bonâ fide* purchaser from the corporation would get no title to the land, although the land records would furnish him no information that the title had passed from the corporation; for of course the deed in the name of the shareholder would not be indexed under the name of the corporation, so that a conveyancer examining the records for conveyances by the corporation would be quite unable to find the deed.

When tempted to disregard the doctrine of corporate personality, we may often find it helpful to concentrate attention, not upon that legal dogma, but upon the hard-and-fast rules of law which have been deduced from the dogma or from which that dogma has been deduced.[15] For instance, the rule that actions or suits to enforce corporate rights must be in the corporate name may have been deduced from the legal rule that in all *casus omissi* a corporation shall be regarded as if it were a single person, or it may have been one of the rules specifically prescribed for the government of companies, which induced the generalization that such companies shall be regarded as if each were a single person; but, whatever may have been the historical origin of the rule, it is now as well fixed in the law as if some act of the legislature expressly provided that all actions to enforce corporate rights shall be instituted in the name of the corporation. Consequently in enforcing that rule the courts need not now resort to the doctrine of corporate personality to justify their decisions; to do so is rather confusing. When a court is asked to suspend that rule in favor of some particular litigant, as in the case suggested in a former paragraph, the question is not so much whether the court will "go behind the corporate entity" as whether it will suspend an established rule of law, which may or may not have had its origin in the doctrine of corporate personality.

The difficulty comes where no controlling rule has been laid down by statute or by authoritative judicial decision and where the question arises whether, in some case not specifically so gov-

[15] As to the divergence of opinion whether certain rules of law are the causes or the consequences of the personification of corporations, see de Vareilles-Sommières, Les Personnes Morales, sec. 482.

erned, a corporation shall be regarded as if it were a person. For instance, a statute is passed applicable to "persons." Are corporations within that statute? This is a question which, in the absence of any clear indication of legislative intent one way or the other, may properly be decided by applying the legal fiction of corporate personality. In all such cases, however, considerable latitude must be allowed to judicial discretion.

But the temptation to apply the doctrine of corporate personality too sparingly is much less insidious than the temptation to apply it too freely. For notwithstanding the indispensable assistance which is afforded by the conception of a corporation as a person in solving legal problems, yet that idea should not be exalted into a divinity, or a great mysterious dogma, before which as loyal disciples of the common law we must stand in reverent awe, believing where we cannot prove. There is no command to fall down and worship the imaginary corporate personality, like the golden image which Nebuchadnezzar set up. Still less should the doctrine of the corporate fiction be treated as an oracle to be consulted on every question in corporation law. It does not, like Wamba's "*Pax vobiscum*," constitute an answer to every question. To the points at issue in the great majority of cases in corporation law that now come before the courts, the doctrine of the corporate fiction is quite irrelevant, and only harm can come from attempting to apply it.

For example, take a recent case in which the Supreme Court of the United States and the Supreme Court of Massachusetts have differed in opinion. The facts were, in brief, as follows: Certain promoters had organized a corporation for the purpose of buying certain property to which they themselves held the title. The sale was made and consummated at a time when they and their confederates constituted the board of directors and held all the outstanding shares of the corporation, so that all the persons then interested were fully apprised of the facts. The total authorized number of shares had not, however, at that time been issued, but the promoters contemplated offering them for public subscription. Afterwards, they were subscribed and taken by the public. The new subscribers thus obtained control of the corporation and ascertained that the price paid to the promoters for the property was excessive. The question was whether the sale could be impeached

by the corporation as constituted after the public subscribers had become members. The Supreme Court held that it could not;[16] and the reason assigned was that the corporation after the public subscription of the shares continued to be the same entity as it was at the time the purchase was made with the full and free approval of every person then holding shares. Now, it is submitted that in thus lugging in, if the expression may be pardoned, the doctrine of the corporate entity, the court merely diverted attention from the real issue. Without doubt, a corporation is a legal entity so that if it was irrevocably bound at the time the purchase was made, the fact that other persons who were kept in ignorance of the true circumstances subsequently became shareholders would not confer upon the entity the right to undo a transaction by which it had formerly been bound. But what was the real question before the court? Was not the real question whether or not the corporation in the first days of its organization, when its destinies were in the hands of promoters who contemplated transferring control to future subscribers, was under a disability, in a court of equity, analogous to that of infancy, so that its consent given at that time was no less voidable than the consent of an infant would have been? With that question the doctrine of the corporate personality had nothing whatever to do.

Yet many lawyers find as great difficulty in keeping the doctrine of corporate personality out of their legal reasoning as Mr. Dick experienced in keeping Charles the First's head out of his memorial.[17] Infinite harm has come from assuming that the doctrine of the corporate fiction will solve all problems in the law of corporations.

One cause of this unfortunate tendency to regard the corporate fiction as a touchstone to be applied to all questions connected with corporations — a tendency which is evinced by those who affect to disapprove the doctrine that a corporation is a separate entity or personality, almost as much as by those who earnestly preach that doctrine — one cause of this tendency is the belief

[16] Old Dominion Copper Co. *v.* Lewisohn, 210 U. S. 206. *Contra*, Old Dominion Copper Co. *v.* Bigelow, 188 Mass. 315, 89 N. E. 193. See also Mason *v.* Carrothers, 74 Atl. 1030 (Me.).

[17] For instance, a learned Italian writer, after mentioning a long list of mooted questions in company law, adds, "A tutte queste domande è la teoria della personalità giuridica che deve dare una risposta." Ferrara, Le Persone Giuridiche, 2.

that has been noticed above that the conception of the corporate entity is something very technical. We lawyers are naturally prone to take an especial interest in those rules of law which are most inexplicable to the lay mind. We like to perch ourselves upon some pinnacle of learning from which we may look down with complacency upon the whole world that lieth in darkness at our feet. This is the secret of the fascination of the rule in Shelley's Case for many lawyers. It is a sacred mystery into which the uninitiated cannot pry. In consequence of the scholastic terms in which the doctrine that a corporation is an entity, and that this entity is a person, has been handed down to us, we have erroneously come to regard it too as one of these mysteries of the profession, and have therefore taken a delight in applying it on all possible occasions — even on some occasions in which its application was in reason impossible.[18] The writer cannot claim an exemption from this tendency to apply the doctrine of the corporate fiction to cases where it properly has no application.[19] But the subtlety of this temptation ought to serve as a warning against this dangerous error of overestimating the importance of the denial, or acceptance, of the conception of a corporation as a legal entity or person, and of treating the doctrine as the decisive point in many cases with which it really has nothing to do.

Particularly, in any discussion as to the justice or injustice of a proposed rule, the fiction of corporate personality is altogether irrelevant. The corporate fiction has no proper place in legislative debates. In order to determine whether a law is just or unjust, its effect upon *men*, and not corporate personalities, must be considered. Yet nothing is more common than an effort to justify the justice or policy of certain laws by means of the doctrine of corporate personality. Thus, in the French Revolution, the republicans sought to justify confiscation of property belonging to corporations, under the plea that the property in question belonged, not to human beings, but to legal personalities whose existence depended upon the gracious pleasure of the state and might therefore be terminated at any time, so as to leave their property

[18] See passage from de Vareilles-Sommières, Les Personnes Morales, quoted *infra*, note 25.

[19] See 10 Col. L. Rev. 183, criticising, perhaps not without justice, a statement by the present writer.

without an owner and to cause it to escheat to the state.[20] We stand aghast at these excesses; but even in America similar excuses for unjust laws are often heard in our halls of legislation.

The distinction between the abuse and the legitimate use of the doctrine of corporate personality may be made clearer by a concrete case. The question has often arisen whether the dispensing of liquor by an incorporated club to its members is within the meaning of laws regulating or prohibiting the sale of intoxicating liquors; and a majority of the courts before whom the point has come have held, applying the doctrine of the corporate fiction, that when an incorporated club, which is in law a person, transfers liquor to one of its members, a sale takes place from one person to another, and that such a transfer is therefore within the statute. This is a perfectly proper application of the doctrine that a corporation is to be regarded in law as if it were a person. But suppose the question should come before the legislature whether such laws ought to be so framed as to exempt incorporated clubs selling liquors to their members. Opponents of such an exemption would be very apt to base their arguments in part upon the doctrine of corporate personality, and to contend that because a corporation is a legal person it ought in reason and justice to be governed by the same rules as other persons. Yet it is perfectly clear that the legislature can only be confused by such an argument. For the justice or injustice, the policy or impolicy, of the proposed exemption must be judged with reference to actual facts and not with reference to legal fictions.

Another illustration of the mistaken extension of the corporation fiction to the domain of politics will suffice. Gladstone, in his Tory days, reasoning in support of a religious establishment, contended that the state is a person, and therefore bound like natural persons to maintain divine worship. He was, of course, not so illogical as to base his argument on any legal fiction that the state is a person, but he reasoned, or assumed, with Gierke and his school, that the entity formed by the coöperate union of natural persons is a real person. Had he adopted what we conceive to be the true doctrine that such an entity is really impersonal and is regarded as a person only by way of metaphor or legal

[20] De Vareilles-Sommières, Les Personnes Morales, 65; 1 Michoud, La Théorie de la Personnalité Morale, 380–381.

fiction, the fallacy of founding an argument in support of a state church on so sandy a foundation would have been apparent. As it was, his critic, Macaulay, confuted him by a *reductio ad absurdum*, showing that every collection of individuals is a person in the same sense as the state, so that Gladstone's argument would lead to the absurdity that every collection of individuals would be bound to support a church. Said Macaulay:

"Is it not perfectly clear that this argument applies with exactly as much force to every combination of human beings for a common purpose as to governments? *Is there any such combination in the world, whether technically a corporation or not, which has not this collective personality* from which Mr. Gladstone deduces such extraordinary consequences? Look at banks, insurance offices, dock companies, gas companies, hospitals, dispensaries, associations for the relief of the poor, associations for apprehending malefactors, associations of medical pupils for procuring subjects, associations of country gentlemen for keeping foxhounds, book societies, benefit societies, clubs of all ranks, from those which have lined Pall Mall and St. James's Street with their palaces, down to the Free-and-easy which meets in the shabby parlour of a village inn. Is there a single one of these combinations to which Mr. Gladstone's argument will not apply as well as to the state? In all these combinations, in the Bank of England, for example, in the Atheneum club, the will and agency of the society are one, and bind the dissentient minority. The Bank and the Atheneum have good faith and a justice different from the good faith and justice of the individual members. The Bank is a person to those who deposit bullion with it. The Atheneum is a person to the butcher and the wine-merchant." [21]

VIII.

Above all, we should lay to heart the utter futility, and worse, of speaking or thinking of a corporation as "endowed by the state with personality." Such expressions are very common both with us and on the Continent of Europe. Yet they are devoid of value. So far as corporate entities are real, they rise into being whenever men coöperate for a common purpose, quite independently of the state. The state may strive to suppress them, as many rulers have done; but the difficulty which such rulers have

[21] Macaulay's "Gladstone on Church and State," Works (London, 1875), vol. 6, p. 337.

encountered is enough to demonstrate that the beings they sought to suppress were not created by the power which found such difficulty in suppressing them.[22] Indeed, we ourselves see how the state is sometimes forced to recognize in part the existence of *de facto* corporations which, being formed contrary to its laws, certainly cannot be regarded as created by it. Moreover, if corporations are endowed with personality by the state, who endowed the state, which also is a corporation, with that mysterious attribute? [23] On the other hand, so far as a corporate entity is personal, its personality is fictitious, or metaphorical; and it is not "endowed with personality by the state" for the simple reason that its personality is imaginary. As well speak of John Doe or Richard Roe as endowed by the state with personality.

Still more erroneous is it to speak of corporate personality as a *privilege* conceded by the state. This notion that corporate personality is some mysterious gift from a higher power, bestowed like manna from heaven, goes back, like so much that is confusing in this matter of the corporate entity, to the Roman law.[24] Corporate personality is not a concession from the state, and it is not properly a privilege. So far as it is real, it is a fact recognized but not created by the state; and so far, if at all, as it comes from the state, it is imaginary, and is, therefore, like any other imaginary gift, of no value. All manner of injustice and false reasoning have resulted from the conception of corporate personality as a great privilege presented to loyal subjects by a gracious sovereign.[25]

That the mysterious personality attributed by the courts to an incorporated body of men is of little or no deep legal importance is taught by the extraordinary difficulty of determining whether a given body of men possess this attribute of legal personality, and the uncertainty of the consequences which should follow from its possession. What are the necessary legal consequences of endowing a body of men with this mysterious attribute of a corporate

[22] 1 Michoud, La Théorie de la Personnalité Morale, 33–34.

[23] *Id.*, p. 27. [24] Ferrara, Le Persone Giuridiche, 41.

[25] *Cf.* de Vareilles-Sommières, Les Personnes Morales, sec. 478. "Ceux qui s'imaginent que la personne morale est une création de la loi son forcément inclinés à croire que c'est pour obtenir des résultats extraordinaires que le législateur tire cet être du néant. Il faut découvrir de graves effets à ce prodige. Dans ces dispositions et dans cette nécessité, on rattache à la personnification des phénomènes qui ont une toute autre raison d'être, et désormais on les tient pour impossible en dehors de l'association personnifiée, alors qu'ils sont naturels et légitimes dans toute association."

personality? What vital distinction is there between a corporation and a voluntary association? The courts have never been able to find a satisfactory answer. Such intangible distinctions ought not to be emphasized by the law.

Of course, there may be fine distinctions that are yet of great importance. But in all such cases, however great may be the difficulty of drawing the line, yet as soon as it has been determined that a case falls on a particular side of the line there is no doubt that very different rules are to be applied than if it had fallen on the other. In such cases the distinction, however difficult to draw, is very useful, and indeed indispensable. Thus the distinction between a mushroom and a toadstool may be a fine one, but it cannot safely be ignored. Whatever may be the difficulty in determining to which class a certain fungus belongs, when once that question is answered there is no doubt at all but that the growth is to be treated very differently from the way it ought to have been treated if it had been determined to belong to the other category.

There are many instances in the law of similar fine but necessary distinctions. For instance, take the distinction between a vested and a contingent remainder. Nothing may be more difficult than to determine whether a given limitation in a deed or will is vested or contingent. Lawyers constantly differ upon the question; and the judges, who are forced to decide one way or the other, doubtless often feel that a toss of a penny would furnish the most satisfactory mode of reaching a conclusion. Yet, if once the limitation in question is decided to be vested, there is no doubt about the rules of law by which it is to be governed, and no doubt that those rules of law are very different from those that would have applied if the limitation had been determined to be contingent. Such a distinction is serviceable.

The distinction between those associations which are to be regarded as fictitious legal persons, or in other words corporations, and those which are not, is not of this character. One association will possess certain rights and attributes and be subject to certain liabilities; and the courts will pronounce it a corporate entity. Another association will be judicially declared not to be such an entity, and yet it will possess according to the laws under which it is formed exactly the same rights and attributes and be subject to exactly the same liabilities as the other association.

IX.

What then is the practical conclusion? What are the results of this discussion? The conclusion is that the somewhat confused and self-contradictory statements which we have inherited through Coke and Blackstone from the Roman law and the canon law, and the modern metaphysical discussions in Europe about the nature of corporate personality, combine to teach that we shall walk most safely if we pay least heed to our footsteps, trusting to nature and to common sense to guide our feet in the way they should go. The doctrine of corporate personality is a natural though figurative expression of actual facts. It is only by study and artificiality that we can train ourselves to make it confusing or misleading. The best method of dealing with the doctrine that a corporation is a legal personality is, therefore, to think less about it. The conception itself is a natural one. We do not need to be instructed to regard a corporation as an entity and to regard that entity as a person: our minds are so constituted that we cannot help taking that view. Being a natural conception, it will tend to find its proper place in the law, if only we cease to regard it as something mysterious or technical.

Arbitrary, technical rules must be carefully studied in order to be properly applied. For example, nobody would assert that the application of the rule against perpetuities could safely be left to the natural man. But in applying natural rules or principles, study leads to artificiality. If the truth that twice two makes four had been stated as an abstruse technical doctrine and embedded in a mass of legal terms, we should be much less liable to error by trusting to the multiplication table than by striving to understand and bear in mind the technical statement.

The case with respect to the doctrine of the corporate entity, although similar in kind, is unfortunately not so simple. In the first place, the conception of a corporate personality, although natural and simple, is not so natural or so simple as the conception of twice two as equivalent to four. Consequently, it is not possible to the same extent to dispense with explanations of its legal effect. In the second place, we cannot by an effort of will efface the memory of the familiar terms in which from the earliest days of our legal

education we have heard the doctrine of the corporate entity stated. But we can, and should, fully recognize that the conception is simple and natural, and should endeavor to apply it, though logically and consistently, yet simply and naturally, and not artificially. This is the explanation of the fact, observed with wonder by some jurists, that all the scholarship which has been devoted to the subject in Europe in recent years has only served to increase the confusion.[26]

The feasibility of treating the doctrine naturally and yet logically is shown by the state of the law in England. The English courts apply the doctrine at least as logically and consistently as the American courts — perhaps more logically and consistently than we do — and yet the doctrine has received an insignificant degree of consideration in modern English law. Our nomenclature, "law of corporations," tends to accentuate the importance of the doctrine of corporate personality, whereas the corresponding expression in England, "law of companies," tends to relegate it to its proper place. Lord Lindley's great work on the law of companies, from beginning to end, contains no definition of a corporation, and no discussion of the distinction between a corporation and an unincorporated company. Mr. Hamilton begins his treatise with a definition of a corporation;[27] but he is obliged to resort to an American case as the source of the definition,[28] and from that point on has little or nothing to say on the subject. The very title of Lord Lindley's book, "The Law of Companies considered as a Branch of the Law of Partnership," shows that he is not troubled by abstruse distinctions between companies that are, and those that are not, metaphysical legal persons. Yet, if an American lawyer should publish a book under Lord Lindley's title, he would probably find few purchasers. To the old-fashioned American lawyer it would seem about as reasonable to speak of the law of corporations as a branch of the law of partnership, as to speak of the law of libel as a branch of the law of contingent remainders.

This, then, is the comforting conclusion. We need only trust

[26] Ferrara, Le Persone Giuridiche, 3. "È singolare che le numerose e sempre più acute e penetranti ricerche, invece di chiarire il problema, l'hanno di più complicato." See also the same work, 131–132.

[27] Hamilton, Manual of Company Law, 1.

[28] Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518, 636.

to nature and strive to forget or disregard the technical rules and statements of doctrine in which we have been educated. As scholars, or as students of the history of jurisprudence, we may peruse with interest the erudite and brilliant essays of French, German, and Italian jurists, but as practical lawyers we may and should disregard all that wealth of learning, contemplating it only as something to be avoided, and as teaching the dangerous character of the similar artificial statements which we find in our own law books. To understand and apply correctly the doctrine of corporate personality, no other guide is desirable than sturdy common sense.[29]

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[29] Since the foregoing article was in type, an article entitled "Legal Personality" by Professor W. M. Geldart, an advocate of the reality theory, has appeared in 27 L. Q. Rev. 90. The last-mentioned article informs us that Sir Frederick Pollock has contributed to the recent Gierke Festschrift a discussion of the question, "Has the Common Law received the Fiction Theory of Corporations?" We may look forward to a discussion of the subject by such a master with great interest, not unmingled, however, with apprehension lest the entrance of such a champion into the lists may be the signal for the outbreak in the common-law world of a metaphysical contest similar to that which has absorbed so much attention upon the Continent of Europe.